No. 19-783

IN THE

Supreme Court of the United States

NATHAN VAN BUREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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The Brief in Opposition reinforces the need for this Court to grant review and determine the scope of the "exceeds authorized access" provision of the Computer Fraud and Abuse Act (CFAA). The Government acknowledges the existence of a square conflict among the circuits on the reach of this important and oft-recurring question of federal law. What's more, the Government offers not a single word in defense of the Eleventh Circuit's sweeping reading of the CFAA. In fact, the Government cannot even bring itself to say that the rule it persuaded the Eleventh Circuit to adopt and to apply here is correct.

Despite all that, the Government argues that the Court should deny review because of two purported vehicle problems. Both are insubstantial. First, the Government notes that it may retry petitioner on a separate honest-services charge. But this Court routinely grants certiorari despite the possibility of independent further proceedings—including in a recent criminal case in a materially identical posture. Second, the Government asserts that the jury instructions were consistent with petitioner's reading of the CFAA. But petitioner's appeal challenges the sufficiency of the evidence, not the jury instructions. And, as the Eleventh Circuit recognized, that sufficiency challenge turns squarely on the question on which the circuits are divided. Indeed, the Government itself conceded below that petitioner would be entitled to a judgment of acquittal in the Ninth Circuit and other circuits that take the more limited view of 18 U.S.C. § 1030(a)(2).

This case, in short, is an ideal vehicle for resolving the question presented and bringing much-

needed order to this significant statute. This Court should grant certiorari and reverse.

1. *Split.* The Government acknowledges that the Eleventh Circuit's construction of Section 1030(a)(2) directly conflicts with decisions from the Second, Fourth, and Ninth Circuits—all of which would have ordered petitioner's acquittal. BIO 14. Even if that were the full depth of the conflict, that division of authority would provide more than sufficient basis for certiorari. Conduct that warrants no CFAA sanction in New York, Virginia, and California should not expose someone to a federal felony conviction and five-year prison sentence in Georgia. All the more so in light of the CFAA's particularly expansive and flexible venue regime. *See* Pet. 14-15.

As several courts have recognized, however, the conflict runs even deeper. *See, e.g.*, *United States v. Valle*, 807 F.3d 508, 524 (2d Cir. 2015) (explaining that the First, Fifth, and Seventh Circuits have taken the same position as the Eleventh Circuit); *Teva Pharm. USA, Inc. v. Sandhu*, 291 F. Supp. 3d 659, 669 (E.D. Pa. 2018) (same). The Government disagrees, contending that the First, Fifth, and Seventh Circuits have not "definitively" agreed with the Eleventh Circuit's interpretation of the CFAA. BIO 11. But with respect to each court of appeals, the Government is mistaken.

The Government initially maintains that the First Circuit's decision in *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001), is "factbound," as well as inconclusive because it merely affirmed a preliminary injunction. BIO 11. But nothing about the First Circuit's holding on the meaning of "exceeds authorized access" turned on the

particular nature of the defendants' improper use of information they otherwise had the authority to obtain. *See EF Cultural Travel*, 274 F.3d at 582-83. Nor was that holding in any way indefinite. The First Circuit unequivocally "conclude[d] that because of the broad confidentiality agreement [defendants'] actions 'exceed[ed] authorized access.'" *Id.* at 581 (second alteration in original).

The Government next contends that the Fifth Circuit has not yet addressed whether "*non-criminal*, prohibited purposes" can trigger the CFAA. BIO 13 (emphasis added). But the Fifth Circuit's discussion in *United States v. John*, 597 F.3d 263 (5th Cir. 2010), of whether the defendant was knowingly engaged in an otherwise "criminal: activity was pertinent only to assessing whether its construction of the CFAA conflicted with the holding in *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009). *See John*, 597 F.3d at 272-73. That discussion did not qualify the Fifth Circuit's holding that "the concept of 'exceeds authorized access' may include exceeding the purposes for which access is 'authorized.'" *Id.* at 272. Accordingly, several district courts within the Fifth Circuit have taken *John* to hold what petitioner says it holds, not what the Government says. *See* BIO 13-14 (collecting cases); Pet. 8 (same).

Lastly, the Government misreads the Seventh Circuit's decision in *International Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006). The Government asserts that the complaint there alleged that the individual "had accessed a computer 'without authorization,'" not that he "had done so 'exceed[ing] authorized access.'" BIO 12. Petitioner, however, has already explained that the Seventh Circuit held that

the allegations concerned an individual "exceed[ing] authorized access." *See* Pet. 8 & n.2. The Government offers no response to petitioner's explanation.

2. *Vehicle.* Contrary to the Government's contentions, this case is an excellent vehicle for resolving the conflict over the meaning of Section 1030(a)(2).

a. It is immaterial that, in addition to affirming petitioner's CFAA conviction, the Eleventh Circuit vacated petitioner's separate conviction for honest-services fraud and remanded that count for further proceedings. The only conviction at issue here is petitioner's CFAA conviction. And nothing about that conviction hinges on anything related to the Government's honest-services charge.

That being so, the Government's boilerplate "interlocutory posture" module (BIO 8) has no purchase. As the Government itself has emphasized, this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. 5, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (No. 17-654). In *Smith v. United States*, 568 U.S. 106 (2013), for example, the court of appeals affirmed the defendant's conspiracy convictions and vacated other convictions. *Id.* at 108-09 & n.1. The Court granted certiorari to consider the validity of the former convictions, explaining that the only "relevant" aspect of the case's procedural history was that "the Court of Appeals affirmed Smith's conspiracy convictions." *Id.* at 109. So too here. Petitioner stands convicted of a felony. He has an obvious and abiding interest in the validity of that conviction, regardless of the ultimate disposition of the separate honest-services charge. This Court should grant certiorari to resolve whether the

conviction is valid—or whether, as several other courts of appeals would have held years ago, he is entitled to an acquittal.

b. In a 180-degree reversal of the position it took in the district court and the Eleventh Circuit, the Government also protests that resolving the circuit split in petitioner's favor "would not change the outcome of [his] case." BIO 14. This is so, according to the Government, because "the jury at petitioner's trial found him guilty under jury instructions that were consistent with the narrower interpretation of the [CFAA] that petitioner asks this Court to adopt." *Id.*

This new contention misapprehends the procedural setting of this case. After the Government presented its case at trial, petitioner moved for a judgment of acquittal on the CFAA count. He argued that "accessing [information] for an improper or impermissible purpose does not exceed authorized access" under Section 1030(a)(2). Tr. 391 (Oct. 25, 2017). In response, the Government acknowledged that "defense counsel is right" that that petitioner's undisputed access to the GCIC database for certain purposes would entitle him to an acquittal in "the Ninth Circuit and other circuits." *Id.* at 396. But the Government added that there was a "split in the circuit[s]" over the reach of the CFAA and that "the Eleventh Circuit and other circuits say . . . you can exceed your authorized access, even though you're allowed to be there, once you get there and do something that's outside the scope of what you're allowed to do." *Id.* at 396-97. Agreeing with the Government that Eleventh Circuit precedent precluded an acquittal, the district court denied petitioner's motion. *See* Pet. 5.

Given this argumentation and ruling, nothing about the jury instructions in petitioner's case could undercut his claim—which he pressed below and renews here—that there is insufficient evidence to support his conviction. Pet. App. 26a. "[S]ufficiency review . . . does not rest on how the jury was instructed." *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). Instead, the reviewing court asks whether a rational jury could have found the defendant guilty under the correct interpretation of the statute. *Id.* This Court thus routinely grants certiorari to resolve questions of statutory interpretation that determine the merits of sufficiency challenges. *See, e.g.*, *Kelly v. United States*, No. 18-1059 (argued on Jan. 14, 2020); *Shaw v. United States*, 137 S. Ct. 462, 466-69 (2016); *Yates v. United States*, 135 S. Ct. 1074, 1080 (2015); *Flores-Figueroa v. United States*, 556 U.S. 646, 649-50 (2008). And here, the Eleventh Circuit correctly recognized that petitioner's sufficiency challenge rises or falls on a pure question of statutory construction: whether "misusing databases that a defendant lawfully can access"—the only act the Government alleged he committed—"constitute[s] computer fraud." Pet. App. 28a.

In any event, the jury instructions here did not require the jury to find petitioner violated "the narrower interpretation of the [CFAA] that [he] asks this Court to adopt," BIO 14. The district court instructed the jury that "exceeds authorized access" means using authorized access to obtain or alter information that "the person is not permitted to get or change." Tr. 560. That instruction simply repeated the central ambiguity in Section 1030(a)(2) that has divided the circuits. "Not permitted" could be limited

(as the Second, Fourth, and Ninth Circuits hold) to the situation where there is *no* purpose for which the defendant was entitled to access the information, or it could extend (as the First, Fifth, Seventh, and Eleventh Circuits hold) to situations where the defendant accessed the information for a purpose beyond the purposes for which he was authorized to obtain it. And when ambiguity in jury instructions leaves "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations," a reviewing court cannot assume the jury made findings under the narrower of the two possible interpretations. *United States v. Svete*, 556 F.3d 1157, 1161 (11th Cir. 2009) (en banc) (quotation marks and citation omitted); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2374 (2016) (reversing conviction where instructions "provided no assurance" that jury made requisite findings).

Furthermore, language in a jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). In this respect, "the prosecutor's closing argument" is critical. *Waddington v. Sarausad*, 555 U.S. 179, 193 (2009). At closing in this case, the Government never argued that petitioner was categorically prohibited from accessing the information at issue. Rather, the Government conceded that "he had access" to the database, but maintained that petitioner "exceeded his authorized access to that database" because he accessed it "for a nonlaw enforcement purpose." Tr. 519 (Oct. 26, 2017); *see also id.* at 515 (same). To drive the point home, the prosecutor continued:

> Many of you work on computers in your own jobs. You have access to computers to do your job. If you go on the computer and access personal information and provide it to someone else, you've exceeded your authority.
>
> *You're allowed to be on the network, but once you're using the network that's against what your job or policy prohibits, you've exceeded your access.* You've gone too far, and *this is the concept that this defendant violated*. He violated this federal law when he ran that tag query for his own personal benefit and for a nonlaw enforcement purpose.

Id. at 520 (emphasis added). In light of this argument, the notion that the jury here convicted petitioner because it believed he was not permitted to access the database *at all* is impossible to credit.

Lest there be any doubt, the Government never mentioned the jury instructions while defending this petitioner's CFAA conviction in the Eleventh Circuit. Nor did the Government deny that petitioner had a right to access the information here for some purposes. Nor did it dispute that this right of access would have precluded his conviction under the CFAA in "other circuits." Gov't CA11 Br. 43. Instead, the Government argued that the panel was "bound" by the Eleventh Circuit's holding in *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), to reject petitioner's sufficiency-of-the-evidence claim. *Id.* As the Government put it: "The district court correctly denied Van Buren's motion for acquittal because the evidence showed he was not permitted to access the GCIC computer database *for personal or non-law-*

enforcement purposes." *Id.* at 42 (emphasis added). The Eleventh Circuit upheld the conviction on that "improper purpose" ground alone. Pet. App. 26a-28a.

3. *Importance.* The Government does not dispute that it has prosecuted some people under the CFAA merely for violating companies' terms-of-service agreements. BIO 18. And although the Government conspicuously declines to endorse those prosecutions, it also does not disclaim them. Nor does the Government deny that the Eleventh Circuit's interpretation of Section 1030(a)(2) allows the Government to prosecute people even for "checking sports scores at work, inflating one's height on a dating website," or engaging in other "commonplace" conduct. BIO 18 (internal quotation marks and citation omitted); *see also* Br. of NACDL 4-6. The Government argues, however, that none of this presents a problem because the Department of Justice currently has a charging policy, adopted in 2014, that "ameliorates" concerns regarding the statute's breadth. BIO 16-17.

The Government has it backwards. Time and again, the Court has emphasized that it cannot "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018) (quoting *McDonnell*, 136 S. Ct. at 2372-73); *see also United States v. Stevens*, 559 U.S. 460, 480 (2010). The same goes for deciding whether to grant review. "It is the statute," not any set of bureaucratic guidelines, "that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *see also* Br. of Electronic Frontier Found. et al. 20-22 (discussing one aspect of the CFAA's ongoing chilling effect). Indeed, the

Government could ignore or suspend its current charging policy tomorrow, and no individual could claim justifiable reliance on it. Consequently, the only significance of the Government's purported effort to discourage prosecutorial zeal is that it backhandedly underscores that its conception of the CFAA is far too expansive to begin with.

At any rate, the Government's current policy does not meaningfully restrain prosecutorial authority. The policy merely lists various "factors"—none of which is grounded in the actual text of Section 1030(a)(2)—that prosecutors should "consider" before bringing a case under the CFAA. BIO 17. If none is present, a federal prosecution "may not be warranted." *Id.* at 18. But even the use of the word "may" hedges the Government's position. The policy amounts to no protection at all.

Even more important, the Government's current policy obviously allows prosecutions like *this case*. (Recall, in fact, that this CFAA prosecution arose from a sting operation that the FBI constructed to include a covered computer system—not from petitioner's own initiative. *See* Pet. 4.) And the Eleventh Circuit and others have condoned such prosecutions, expressly rejecting the considered views of several other circuits that they stretch the CFAA beyond its breaking point. This Court should resolve that disagreement and force the Government to abide by a uniform and limited construction of the CFAA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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